

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

December 22, 2003

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IN RE: Complaint of BellSouth) *Docket No. 02-01203*
Telecommunications, Inc. to Enforce)
Interconnection Agreement Between BellSouth)
Telecommunications, Inc. and ITC^DeltaCom)
Communications, Inc. and Request for)
Expedited Proceedings)

IN RE: Complaint of BellSouth) *Docket No. 02-01204*
Telecommunications, Inc. to Enforce)
Interconnection Agreement Between BellSouth)
Telecommunications, Inc. and XO Tennessee,)
Inc. Communications, Inc. and Request for)
Expedited Proceedings)

JOINT MOTION OF XO AND ITC^DELTACOM FOR SUMMARY JUDGMENT

ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") and XO Tennessee, Inc. ("XO") submit the following Joint Motion for Summary Judgment in the above-captioned complaint proceedings filed by BellSouth Telecommunications, Inc. ("BellSouth").

SUMMARY

In each of these proceedings, BellSouth is demanding the right to conduct extensive audits of how XO and ITC^DeltaCom make use of loop-transport combinations (called "enhanced extended links" or "EELs") in the provision of telephone service. In response to the complaints, XO and ITC^DeltaCom each raised a number of objections regarding, among other things, BellSouth's right to conduct the audits, the independence of the auditors, and the scope of the audits.

BellSouth's complaints were filed a year ago but the proceedings were suspended pending issuance of the FCC's Triennial Review Order¹ ("TRO"). That Order, which became effective in October, reaffirms and clarifies an earlier FCC Order, the "Supplemental Order Clarification," which provided the legal basis for the original audit requests.² As explained further below, the Order affirms each of the points raised by XO and ITC^DeltaCom and essentially moots BellSouth's original complaints.

In light of these developments, the Tennessee Regulatory Authority should dismiss both complains and instruct BellSouth that, if the carrier wishes to pursue its audit requests, it must do so in accordance with paragraphs 620 through 629 of the TRO. Copies of those paragraphs are attached and are discussed below.

BACKGROUND

Under the federal Telecommunications Act and the FCC's rules, a competing local exchange carrier ("CLEC") may lease from an incumbent carrier unbundled network elements including loops, inter-office transport, and a loop-transport combination. Such a combination is called an enhanced extended link or "EEL." An EEL may be ordered new from the incumbent. On the other hand, if the CLEC is already leasing a special access circuit, which can be used to carry traffic in the same manner as an EEL, the CLEC may ask that the special access circuit be "converted" to an EEL.³ The FCC placed some restrictions, however, on how converted EELs

¹ In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al., CC Docket No. 01-338, et al., FCC 03-36 (rel. Aug. 21, 2003) ("Triennial Review Order" or "TRO").

² Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Docket No. 96-98, Supplemental Order Clarification, FCC 00-183, 15 FCC Rcd 9587 (released June 2, 2000) ("Supplemental Order Clarification.") A copy of the relevant paragraphs of the Order is attached. As can be seen by comparing the language in the parties' interconnection agreements, also attached, the Order provides the legal basis for the audit provisions in the agreements.

³ This "conversion" is simply a billing adjustment. Instead of paying for a special access circuit, the CLEC is billed for a less expensive EEL. Supplemental Order Clarification, ¶ 30.

may be used. During the time period which is the subject of BellSouth's audit requests, a CLEC seeking to convert a special access circuit to an EEL had to certify to BellSouth that the EEL would be used for a "significant amount" of local telephone traffic. Supplemental Order Clarification, ¶ 1. The FCC defined "significant amount" in several ways. If the CLEC could show that the line met any of those definitions, called "safe harbors," the CLEC could convert the switched access circuit to an EEL. For example, if the CLEC providing the EEL to an end user certified that the CLEC was the end user's only local service provider, the FCC said it would conclusively presume that the EEL carried a "significant amount" of local traffic regardless of how much local traffic the line actually carried.

Recognizing that an incumbent local exchange carrier such as BellSouth should be able to verify that a converted EEL is carrying sufficient local traffic to meet the FCC's requirements, the FCC gave incumbents the right to request "limited" audits by an "independent third party" of the converted EELs. *Id.*, ¶ 1 and 31. Concerned that the audit not be a burden on small CLECs, the FCC ordered an audit request may only be made once a year. Furthermore, the FCC directed that an incumbent carrier could not require an audit unless the incumbent had a demonstrable "concern" that CLEC traffic on a converted EEL did not meet one of the FCC's "safe harbors." The agency said that "this should be the only time" that an incumbent could demand an audit. The Supplemental Order Clarification states (at footnote 86):

The incumbent LEC and competitive LEC signatories [which included BellSouth] to the *February 28, 2000 Joint Letter* state that audits will not be routine practice, but will only be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange service. *February 28, 2000 Joint Letter* at 3. We agree that this should be the only time that an incumbent LEC should request an audit.

As an additional precaution to prevent incumbents from abusing their audit rights, the FCC also required incumbents to file copies of all audit requests with the FCC. Id., at ¶ 31.

Following issuance of the Supplemental Order, both XO and ITC^DeltaCom entered into interconnection agreements, or amended existing agreements, to implement the Supplemental Order and require BellSouth to allow the CLECs to convert special access lines to EELs. Section 1.4 of an amendment to the XO agreement, entitled “Special Access Service Conversion,” provides for such conversions and grants BellSouth limited audit rights, tracking the language of the Supplemental Order. The relevant provisions of the XO agreement are attached to this Motion. Similarly, Section 8.3.5 of the ITC^DeltaCom agreement, entitled “Special Access Conversion,” also provides for conversions and audits (see subsection 8.3.5.3). A copy is attached.

DISCUSSION

BellSouth filed these complaints last year because, the carrier argued, XO and ITC^DeltaCom had refused to cooperate with BellSouth’s audit requests. But BellSouth’s requested relief goes far beyond the “limited” audit authorized by the Supplemental Order Clarification and would impose significant and unwarranted financial and administrative burdens on those carriers. In response, XO and ITC^DeltaCom raised the following objections:

First, BellSouth’s complaints do not state the reason for the audit requests. BellSouth must articulate a specific, relevant “concern” and explain why it believes that a converted EEL does not fit into one of the FCC’s safe harbors.

Second, the Supplemental Order Clarification only authorizes BellSouth to request audits of converted EELs. It does not apply to new EELs. Contrary to the Order and contrary to the

proposal of BellSouth's own auditors,⁴ BellSouth demands an audit of all EELs, both converted EELs and new EELs, in Tennessee.⁵ BellSouth's position is also inconsistent with the carriers own prior interpretation of the Supplemental Order Clarification. When a CLEC asks to convert a special access line to an EEL, the CLEC must certify to BellSouth that the converted EEL falls within a specific safe harbor provision. There is no such requirement when a CLEC orders a new EEL from BellSouth. Attached is a copy of BellSouth's instructions to CLECs on (1) how to order new EELs and (2) how to convert a switched access circuit to an EEL. Only in the latter case does BellSouth require the CLEC to certify that the line is carrying a significant amount of local traffic. See attached Instructions to CLECs at pp. 3 and 6.

Third, instead of selecting an "independent" auditing firm, BellSouth has selected a group of former employees of incumbent carriers who market their services on the basis that they will help incumbents recover large sums from CLECs. The auditors sell themselves as treasure hunters. See attached letter from ACA to BellSouth. The CLECs ask that BellSouth select a nationally recognized auditing firm to conduct a truly "independent" audit.

Fourth, contrary to the idea of "limited" audit, the auditors selected by BellSouth propose to examine, not a representative sampling of EELS, but every single EEL used by the CLECs, thus causing a substantial administrative burden to the carriers. See attached letter from ACA to BellSouth.

As discussed earlier, the TRO addresses and resolves each of the four issues raised by XO and ITC^DeltaCom.

⁴ Consistent with the Supplemental Order Clarification, the proposal made to BellSouth by its auditors stated that the auditors intended to examine only converted EELs. See attached letter, dated February 20, 2002, from ACA to BellSouth, paragraph one.

⁵ BellSouth stated at the time it filed the complaints that ITC^DeltaCom has no converted EELs in Tennessee, only new EELs. (ITC^DeltaCom does have converted EELs in other states.)

First, the TRO reaffirms that BellSouth cannot demand an audit without justification. The “Supplemental Order Clarification” described it as a “concern”. The TRO is more explicit, stating that the verification process must be “based upon cause”. Paragraph 622. In other words, BellSouth must provide some objective evidence that a converted EEL is being misused. BellSouth’s complaint makes no such showing.

Second, the TRO reaffirms that the audit rights granted in the Supplemental Order Clarification “only addressed EEL conversions.” *Id.*, at paragraph 623, emphasis added. The Supplemental Order did not give incumbents any right to audit new EELs. (In contrast, the FCC now allows, on a prospective basis, audits of both converted EELs and new EELs. *Id.*, at paragraphs 623 and 624.)

Third, the TRO states that “independent” auditor must “perform its evaluation in accordance with the standards established by the American Institute for Certified Public Accountants (AICPA).” *Id.*, at paragraph 626. As the FCC noted, the AICPA has standards and requirements for, among other things, “determining the independence of an auditor.” Therefore, BellSouth’s hand picked firm must demonstrate that it is “independent” as defined by the AICPA’s standards.

Fourth, the FCC states that such audits incorporate “the concept of materialism” in accordance with the AICPA’s standards⁶ and that such audits “typically include an examination of a sample selected in accordance with the independent auditor’s judgment.”⁷ In other words, the auditor cannot embark on an unrestricted fishing expedition and demand to examine every EEL. He or she should review a representative “sample” of EELs to determine compliance.

⁶ See TRO at footnote 1906.

⁷*Id.*, at paragraph 626, explaining that the use of a representative sampling is “consistent with standard auditing practices.”

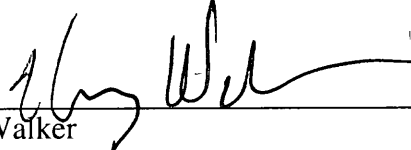
Finally, the TRO makes clear that, while the “details” of an audit may be set forth in the parties’ interconnection agreements and implemented by the state commissions, the “basic principles regarding carriers’ rights to undertake and defend against audits” are set forth in the FCC’s orders. Id., at paragraph 626. The agency found that these “basic principles” strike “the appropriate balance” between the rights of incumbents and the “risk of illegitimate audits that impose costs on qualifying carriers.” Id. The parties and the states may address the details of how these principles are implemented but, just as the parties are bound by the FCC’s rules, the parties are also bound by, and protected by, the “basic principles” set forth in Supplemental Order Clarification and in the TRO.

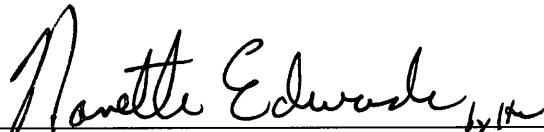
CONCLUSION

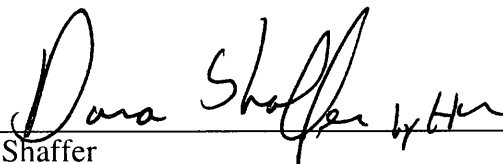
In light of the TRO, BellSouth’s Complaints should be dismissed. They are clearly premised upon legal and policy assumptions that are no longer valid. BellSouth, of course, is free to invoke its audit rights at any time, or to re-file a complaint, if BellSouth can demonstrate compliance with the requirements of the TRO. This matter is over.

Respectfully submitted,

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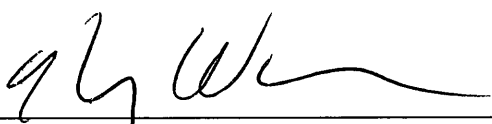

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2003, a copy of the foregoing document was serviced on the parties of record, via US mail:

Guy Hicks, Esq.
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Henry Walker

FCC's Supplemental Order Clarification

Paragraphs 1 and 28-32

Federal Communications Commission

FCC 00-183

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Implementation of the)	
Local Competition Provisions)	CC Docket No. 96-98
Of the Telecommunications Act of 1996)	
)	
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SUPPLEMENTAL ORDER CLARIFICATION

Adopted: May 19, 2000

Released: June 2, 2000

By the Commission: Chairman Kennard and Commissioner Ness issuing separate statements;
Commissioner Furchtgott-Roth dissenting and issuing a statement.

I. INTRODUCTION

1. On November 5, 1999, we released the *Third Report and Order and Fourth Further Notice of Proposed Rulemaking* in this docket responding to the U.S. Supreme Court's January 1999 decision that directed us to reevaluate the unbundling obligations of section 251 of the Telecommunications Act of 1996 (1996 Act).¹ On November 24, 1999, we released a *Supplemental Order* that modified the *Third Report and Order and Fourth FNPRM* with regard to the ability of requesting carriers to use combinations of unbundled network elements to provide local exchange and exchange access service prior to our resolution of the *Fourth FNPRM*.² In this Order, we take three actions to extend and clarify the temporary constraint that we adopted in the *Supplemental Order*. First, we extend the temporary constraint identified in the *Supplemental Order* while we compile an adequate record for addressing the legal and policy disputes presented here. Second, we clarify what constitutes a "significant amount of local exchange service." Third, we clarify that incumbent local exchange carriers (LECs) must allow requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of unbundled network elements, and we allow incumbent LECs to subsequently conduct limited audits by an independent third party to verify the carrier's

¹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3699, para. 1 (1999) (citing *AT&T v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999)) (*Third Report and Order and Fourth FNPRM*).

² *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order, FCC 99-370 (rel. Nov. 24, 1999) (*Supplemental Order*).

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completing) the customer's local usage," or (c) the carrier certifies that the special access arrangements are used for the completion of local calls, or (d) the special access arrangements are used to provide data services.⁷⁶ It also argues that incumbent LECs that provide interexchange services in a certain market must make unbundled loop-transport combinations available to requesting carriers in that market regardless of whether the requesting carrier is providing any local exchange service to the end user.⁷⁷ We reject these proposals because they offer no way to verify whether a requesting carrier is providing any specified amount of local service. In addition, its proposal to allow unconstrained use of unbundled loop-transport combinations in markets in which the incumbent LEC provides interexchange service does not allow us to preserve the status quo while we consider the issues in the *Fourth FNPRM*. Instead, the three options described above provide a reasonable threshold for determining whether a carrier has taken affirmative steps to provide local service. They are also verifiable for both the requesting carrier and the incumbent LEC and prevent parties from gaming implementation of the interim requirements. While CompTel expresses a concern about incumbent LECs being both an input supplier and a retail competitor in the interexchange market, the temporary constraint, as we explain above, should not allow incumbent LECs that provide in-region long distance service to engage in anticompetitive behavior.⁷⁸

28. We further reject the suggestion that we eliminate the prohibition on "co-mingling" (i.e. combining loops or loop-transport combinations with tariffed special access services) in the local usage options discussed above.⁷⁹ We are not persuaded on this record that removing this prohibition would not lead to the use of unbundled network elements by IXCs solely or primarily to bypass special access services. We emphasize that the co-mingling determinations that we make in this order do not prejudge any final resolution on whether unbundled network elements may be combined with tariffed services. We will seek further information on this issue in the Public Notice that we will issue in early 2001.

29. We clarify that incumbent LECs must allow requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of unbundled network elements.⁸⁰ We do not believe it is necessary to address the precise form that

⁷⁶ With regard to data services, we note that the local usage options we adopt do not preclude a requesting carrier from providing data over circuits that it seeks to convert, as long as it meets the thresholds contained in the options.

⁷⁷ Letter from Jonathan D. Lee, Vice President, Regulatory Affairs, CompTel, to Magalie Roman Sales, Secretary, FCC, CC Docket No. 96-98 (filed Apr. 27, 2000) (*CompTel Apr. 27, 2000 Letter*). Sprint supports CompTel's proposal except for the requirement that incumbent LECs that provide interexchange services in a certain market make unbundled loop-transport combinations available to requesting carriers in that market regardless of whether the requesting carrier is providing any local exchange service to the end user. Letter from Richard Juhnke, General Attorney, Sprint, to Magalie Roman Sales, Secretary, FCC, CC Docket No. 96-98, at 1 (filed May 2, 2000).

⁷⁸ *CompTel Apr. 27, 2000 Letter* at 2.

⁷⁹ See *MCI WorldCom Apr. 4, 2000 Letter* at 6-8; *February 28, 2000 Joint Letter* at 2.

⁸⁰ See *Supplemental Order* at n.9.

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such a certification must take, but we agree with ALTS that a letter sent to the incumbent LEC by a requesting carrier is a practical method of certification.³¹ The letter should indicate under what local usage option the requesting carrier seeks to qualify. In order to confirm reasonable compliance with the local usage requirements in this Order, we also find that incumbent LECs may conduct limited audits only to the extent reasonably necessary to determine a requesting carrier's compliance with the local usage options. We stated in the *Supplemental Order* that we did not believe it was necessary to allow auditing because the temporary constraint on combinations of unbundled loop and transport network elements was so limited in duration.³² Because we are extending the temporary constraint, we find that it is reasonable to allow the incumbent LECs to conduct limited audits.

30. We agree with ALTS that once a requesting carrier certifies that it is providing a significant amount of local exchange service, the process by which special access circuits are converted to unbundled loop-transport combinations should be simple and accomplished without delay.³³ We stated in the *Third Report and Order* that incumbent LECs and requesting carriers have developed routine provisioning procedures that can be used to deploy unbundled loop-transport combinations using the Access Service Request process, a process that carriers have used historically to provision access circuits.³⁴ Under this process, the conversion should not require the special access circuit to be disconnected and re-connected because only the billing information or other administrative information associated with the circuit will change when a conversion is requested. We continue to believe that the Access Service Request process will allow requesting carriers to avoid material provisioning delays and unnecessary costs to integrate unbundled loop-transport combinations into their networks, and expect that carriers will use this process for conversions.

31. We agree with MCI WorldCom that upon receiving a conversion request that indicates that the circuits involved meet one of the three thresholds for significant local usage that the incumbent LEC should immediately process the conversion.³⁵ We emphasize that incumbent LECs may not require a requesting carrier to submit to an audit prior to provisioning combinations of unbundled loop and transport network elements.³⁶ There is broad agreement

³¹ See *ALTS March 24, 2000 Letter* at 13.

³² See *Supplemental Order* at n.9

³³ *ALTS March 24, 2000 Letter* at 13.

³⁴ See *Third Report and Order*, 15 FCC Red at 3831, para. 298, n.581. ALTS states that the Access Service Request process has been adopted by industry consensus in New York. *ALTS March 24, 2000 Letter* at 13.

³⁵ *MCI WorldCom Apr. 4, 2000 Letter* at 9.

³⁶ The incumbent LEC and competitive LEC signatories to the *February 28, 2000 Joint Letter* state that audits will not be routine practice, but will only be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange service. *February 28, 2000 Joint Letter* at 3. We agree that this should be the only time that an incumbent LEC should request an audit.

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among the incumbent LECs and the competitive LECs on auditing procedures. In particular, parties agree that incumbent LECs requesting an audit should hire and pay for an independent auditor to perform the audit, and that the competitive LEC should reimburse the incumbent if the audit uncovers non-compliance with the local usage options.⁸⁷ In order to reduce the burden on requesting carriers, we find that incumbent LECs must provide at least 30 days written notice to a carrier that has purchased a combination of unbundled loop and transport network elements that it will conduct an audit, and may not conduct more than one audit of the carrier in any calendar year unless an audit finds non-compliance. We agree with Bell Atlantic that at the same time that an incumbent LEC provides notice of an audit to the affected carrier, it should send a copy of the notice to the Commission.⁸⁸ While the Commission will not take action to approve or disapprove every audit, the notices will allow us to monitor implementation of the interim requirements.

32. We expect that requesting carriers will maintain appropriate records that they can rely upon to support their local usage certification. For example, US West points out that records that demonstrate that a requesting carrier's unbundled loop-transport combination is configured to provide local exchange service should be adequate to support the carrier's certification without the need for extensive call detail records.⁸⁹ We emphasize that an audit should not impose an undue financial burden on smaller requesting carriers that may not keep extensive records, and find that, in the event of an audit, the incumbent LEC should verify compliance for these carriers using the records that the carriers keep in the normal course of business. We will not require specifically that incumbent LECs and requesting carriers follow the other auditing guidelines contained in the *February 28, 2000 Joint Letter*. As the parties indicate, in many cases, their interconnection agreements already contain audit rights.⁹⁰ We do not believe that we should restrict parties from relying on these agreements.

33. We note that the requirements in this order will take effect immediately upon publication in the Federal Register. We find good cause for doing so because they will allow incumbent LECs to promptly process requests from requesting carriers for access to unbundled loop-transport combinations, and provide the industry with more clearly defined standards for using combinations during the interim period prior to our resolution of the *Fourth FNPRM*.

⁸⁷ See, e.g., *February 28, 2000 Joint Letter* at 3; *ALTS March 24, 2000 Letter* at 12; *MCI WorldCom Apr. 4, 2000 Letter* at 10.

⁸⁸ *Bell Atlantic Apr. 11, 2000 Letter* at 3.

⁸⁹ *US West Apr. 13, 2000 Letter* at 1.

⁹⁰ *February 28, 2000 Joint Letter* at 3.

Triennial Review Order
Paragraphs 620-629

no longer had a valid certification to provide service or local interconnection, that carrier should not be eligible for a high-capacity EEL facility. We find that requiring all requesting carriers seeking high-capacity EELs to satisfy the same three categories of criteria provides predictability and certainty, and will ensure that the audit process is more easily administered and, therefore, less costly to both incumbent LECs and competitors.

619. Finally, we do not endorse the requests advanced by some incumbent LECs for additional dialogue on architectural solutions with the goal of a collaborative resolution.¹⁸⁹⁰ In the many months since the issuance of the temporary restrictions of the *Supplemental Order Clarification*, as well as the issuance of the *January 24, 2001 Public Notice*, and the *Triennial Review NPRM*, the Commission has amassed through numerous pleadings, *ex parte* meetings and an industry roundtable a considerable record of the pragmatic difficulties of the current safe harbors and the risk of conversions.¹⁸⁹¹ Now that we have answered the questions regarding service-by-service analysis that led to the interim safe harbors, we conclude that we have a sufficient record to resolve eligibility issues by issuing findings of the appropriate criteria, and that further delay would retard the development of local competition.

C. Certification and Auditing

1. Background

620. In order to allow carriers meeting the safe harbors set forth in the *Supplemental Order Clarification* to convert tariffed loop-transport combinations to UNE rates, the Commission established a framework of self-certification and auditing.¹⁸⁹² The Commission declined to identify precise terms of certification, but recognized that a letter sent to the incumbent LEC is a practical method.¹⁸⁹³ Further, upon receiving a request from a requesting

¹⁸⁹⁰ BellSouth Feb. 13, 2003 *Ex Parte* Letter at 1-3 (contending also that “further industry dialogue in a less rushed atmosphere is likely to result in an improved and more focused proposal”); Verizon Feb. 12, 2003 *Ex Parte* Letter at 4 (asking for more time for various parties to analyze proposals and provide input to the Commission to avoid unintended and unanticipated consequences); Letter from William P. Barr, Verizon, to Michael K. Powell, Chairman, FCC, in Letter from Ann D. Berkowitz, Project Manager – Federal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 2 (filed Feb. 6, 2003) (Verizon Feb. 6, 2003 Barr *Ex Parte* Letter) (asking for the Commission to obtain comment on the various proposals).

¹⁸⁹¹ Several parties note that the issues associated with access to EELs are not new and do not warrant further delay. See, e.g., Letter from John J. Heitmann, Counsel for NuVox and SNiP LiNK, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 2 (filed Feb. 12, 2003) (noting that EEL access issues have been extensively vetted in the *Triennial Review* proceeding and associated proceedings); AT&T Feb. 12, 2003 *Ex Parte* Letter at 4 (arguing that “the Bells have now had years to submit evidence supporting use restrictions generally and the interim rules in particular”) (emphasis in original).

¹⁸⁹² *Supplemental Order Clarification*, 15 FCC Rcd at 9602-04, paras. 28-33.

¹⁸⁹³ *Id.* at 9602-03, para. 29.

carrier certifying to meeting one of the safe harbors, the incumbent LEC should immediately process the conversion.¹⁸⁹⁴

621. The Commission also found that, to confirm reasonable compliance with the local usage requirements in that Order, incumbent LECs may conduct limited audits only to the extent reasonably necessary to determine a requesting carrier's compliance with the local usage options identified by the carrier.¹⁸⁹⁵ The Commission emphasized "that incumbent LECs may not require a requesting carrier to submit to an audit prior to provisioning combinations of unbundled loop and transport network elements."¹⁸⁹⁶ Moreover, the Commission concluded that "audits will not be routine practice, but will only be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange service."¹⁸⁹⁷ Relying upon broad agreement between incumbent and competitive LECs in that proceeding on audit procedures, and to reduce the burden on requesting carriers, the Commission set forth additional principles providing competitors with notice, limiting the frequency of audits, and establishing practical recordkeeping requirements.¹⁸⁹⁸

¹⁸⁹⁴ *Id.* at 9603-04, para. 31.

¹⁸⁹⁵ *Id.* at 9602-03, para. 29

¹⁸⁹⁶ *Id.* at 9603-04, para. 31.

¹⁸⁹⁷ *Id.* at 9603-04 n.86.

¹⁸⁹⁸ The Commission found "that incumbent LECs must provide at least 30 days written notice to a carrier that has purchased [an EEL] that it will conduct an audit;" "may not conduct more than one audit of the carrier in any calendar year unless an audit finds non-compliance;" and that when "an incumbent LEC provides notice of an audit to the affected carrier, it should send a copy of the notice to the Commission" so the Commission can monitor the implementation. These carriers also agreed that incumbent LECs requesting an audit should hire and pay for an independent auditor to perform the audit, and that the competitive LEC should reimburse the incumbent LEC if the audit uncovers non-compliance with the local usage options. The Commission also stated its expectation "that requesting carriers will maintain appropriate records . . . to support their local usage certification," but emphasized "that an audit should not impose an undue financial burden on smaller requesting carriers that may not keep extensive records," and found that, "in the event of an audit, the incumbent LEC should verify compliance for these carriers using the records that the carriers keep in the normal course of business." *Supplemental Order Clarification* at 9603-04, paras. 31-32.

On May 17, 2002, NuVox filed a Petition for Declaratory Ruling in Docket No. 96-98 identifying certain auditing issues, and seeking further declaration from the Commission regarding auditing procedures. *Pleading Cycle Established for Comments on NuVox, Inc. Petition for Declaratory Ruling*, Public Notice, CC Docket No. 96-98, DA 02-1302, Public Notice (rel. June 3, 2002). Among other relief, NuVox requests that the Commission declare that an independent LEC must provide requesting carrier proof of the independence of the third party auditor, and that competitive LECs must reimburse the incumbent LEC for only the *pro rata* share of the circuits found to be non-compliant. NuVox and other carriers make reference to those pleadings in their comments to the instant proceeding, and we address the relevant portions of the responsive pleadings in this Order.

2. Discussion

622. We adopt certification and auditing procedures comparable to those established in the *Supplemental Order Clarification* for our service eligibility criteria, and tailor the substantive requirements to our eligibility restrictions, as set forth below. Although the bases and criteria for the service tests we impose in this Order differ from those of the *Supplemental Order Clarification*, we conclude that they share the basic principles of entitling requesting carriers unimpeded UNE access based upon self-certification, subject to later verification based upon cause, are equally applicable. Significantly, because the eligibility criteria we adopt in this Order are based upon indicators such as collocation more easily verified than traffic measurement or categorization of the safe harbors, we anticipate that these procedures can effectively limit UNE access to bona fide providers of qualifying service without imposing undue burdens upon them.

a. Certification

623. We conclude that requesting carrier self-certification to satisfying the qualifying service eligibility criteria for high-capacity EELs is the appropriate mechanism to obtain promptly the requested circuit, and consistent with our findings of impairment.¹⁸⁹⁹ A critical component of nondiscriminatory access is preventing the imposition of any undue gating mechanisms that could delay the initiation of the ordering or conversion process. Unlike the situation before the Commission when it issued the *Supplemental Order Clarification*, which only addressed EEL conversions, new orders for circuits are subject to the eligibility criteria. Due to the logistical issues inherent to provisioning new circuits, the ability of requesting carriers to begin ordering without delay is essential.¹⁹⁰⁰

624. Before accessing (1) a converted high-capacity EEL, (2) a new high-capacity EEL, or (3) part of a high-capacity commingled EEL as a UNE, a requesting carrier must certify to the service criteria set forth in Part VII.B.2.b in order to demonstrate that it is a bona fide provider of qualifying service. We do not specify the form for such a self-certification, but we readopt the Commission's finding in the *Supplemental Order Clarification* that a letter sent to the incumbent LEC by a requesting carrier is a practical method.¹⁹⁰¹

¹⁸⁹⁹ No certification is necessary for requesting carriers to obtain access to loops, transport, subloops, and other stand-alone UNEs, as well as EELs combining lower-capacity loops, although carriers must provide a qualifying service over those UNEs to obtain them. See *supra* Part VII.B.

¹⁹⁰⁰ If a requesting carrier certifies that it will provide qualifying services over high-capacity EELs in accordance with the Commission's rules, an incumbent LEC that wishes to challenge the certification may not engage in self-help by withholding the facility in question. The success of facilities-based competition depends on the ability of competitors to obtain the unbundled facilities for which they are eligible in a timely fashion. Thus, an incumbent LEC that questions the competitor's certification may do so by initiating the audit procedures set forth below.

¹⁹⁰¹ *Supplemental Order Clarification*, 15 FCC Rcd at 9602-03, para. 29.

b. Auditing

625. As a threshold matter, we set forth basic principles regarding carriers' rights to undertake and defend against audits. However, we recognize that the details surrounding the implementation of these audits may be specific to related provisions of interconnection agreements or to the facts of a particular audit, and that the states are in a better position to address that implementation.¹⁹⁰² For example, to the extent that the parties dispute the definition of an "independent" auditor and whether a given party satisfies the test for independence, the more appropriate forum for this determination is a state commission.¹⁹⁰³

626. We conclude that incumbent LECs should have a limited right to audit compliance with the qualifying service eligibility criteria. In particular, we conclude that incumbent LECs may obtain and pay for an independent auditor to audit, on an annual basis, compliance with the qualifying service eligibility criteria.¹⁹⁰⁴ We conclude that an annual audit right strikes the appropriate balance between the incumbent LECs' need for usage information and risk of illegitimate audits that impose costs on qualifying carriers. The independent auditor must perform its evaluation in accordance with the standards established by the American Institute for Certified Public Accountants (AICPA), which will require the auditor to perform an "examination engagement" and issue an opinion regarding the requesting carrier's compliance with the qualifying service eligibility criteria.¹⁹⁰⁵ We note that, because the concept of materiality governs this type of audit, the independent auditor's report will conclude whether the competitive LEC complied in all material respects with the applicable service eligibility criteria.¹⁹⁰⁶ Consistent with standard auditing practices, such audits require compliance testing designed by the independent auditor, which typically include an examination of a sample selected in accordance with the independent auditor's judgment.

¹⁹⁰² See, e.g., BellSouth Opposition, CC Docket No. 96-98 at 2 (filed June 3, 2002) (reporting that BellSouth filed a complaint with the Georgia Commission on May 13, 2002 requesting the Georgia Commission to direct NuVox to allow the audit to commence immediately).

¹⁹⁰³ See NuVox Petition at 6-7.

¹⁹⁰⁴ See NuVox Petition at 2 (proposing that incumbent LECs obtain and pay for the services of an independent third party auditor).

¹⁹⁰⁵ Letter from John J. Heitmann, Counsel for NuVox, to Michelle Carey, Chief, Competition Policy Division, Wireline Competition Bureau, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 6 (filed Jan. 10, 2003) (NuVox Jan. 10, 2003 EELs and Auditing *Ex Parte* Letter) (proposing that Commission should require AICPA-compliance auditor to perform such audits). See American Inst. of Certified Pub. Accountants, STATEMENTS ON STANDARDS FOR ATTESTATION ENGAGEMENTS NO. 10, at § 6.30 (Jan. 2001) (AICPA ATTESTATION STANDARDS). The AICPA also has standards and other requirements related to standards for determining the independence of an auditor shall govern the audit of requesting carrier compliance.

¹⁹⁰⁶ AICPA ATTESTATION STANDARDS at §§ 6.36 (explaining concept of materiality), 6.64 (explaining reporting issues related to material noncompliance).

627. To the extent the independent auditor's report concludes that the competitive LEC failed to comply with the service eligibility criteria, that carrier must true-up any difference in payments, convert all noncompliant circuits to the appropriate service, and make the correct payments on a going-forward basis. In addition, we retain the requirement adopted in the *Supplemental Order Clarification* concerning payment of the audit costs in the event the independent auditor concludes the competitive LEC failed to comply with the service eligibility criteria.¹⁹⁰⁷ Thus, to the extent the independent auditor's report concludes that the competitive LEC failed to comply in all material respects with the service eligibility criteria, the competitive LEC must reimburse the incumbent LEC for the cost of the independent auditor. We expect that this requirement should provide an incentive for competitive LECs to request EELs only to the extent permitted by the rules we adopt herein.

628. Similarly, to the extent the independent auditor's report concludes that the requesting carrier complied in all material respects with the eligibility criteria, the incumbent LEC must reimburse the audited carrier for its costs associated with the audit.¹⁹⁰⁸ We expect that this reimbursement requirement will eliminate the potential for abusive or unfounded audits, so that incumbent LEC will only rely on the audit mechanism in appropriate circumstances. We further expect that these reimbursement requirements will ensure the audit process (and importantly, the resolution of any issues arising out of any audits) occurs in a self-executing manner with minimal regulatory involvement.

629. Although we do not establish detailed recordkeeping requirements in this Order, we do expect that requesting carriers will maintain the appropriate documentation to support their certifications. For instance, to demonstrate satisfaction of the first category for high-capacity EELs (authorization to provide voice service), we anticipate that state certification would be the most prevalent form of documentation, but that evidence of registration, tariffing, filing of fees, or other regulatory compliance would be adequate where there is no state certification requirement. To verify that the EEL circuit terminates into a section 251(c)(6) collocation, circuit facility assignment on the order would be sufficient supporting evidence.¹⁹⁰⁹ The local interconnection component of the third criterion can be established after examination of the governing interconnection agreement and the physical circuit connections. We emphasize that these records are only examples of the documentation that carriers should keep, and not intended to be an exhaustive list. Due to the variation in telecommunications systems and technology, and to provide flexibility to competitive LECs in establishing the most efficient

¹⁹⁰⁷ *Supplemental Order Clarification*, 15 FCC Rcd at 9603-04, para. 31 (requiring competitive LECs to "reimburse the incumbent if the audit uncovers non-compliance with the local usage options.").

¹⁹⁰⁸ We note that audited carriers should account for the staff time and other appropriate costs for responding to the audit (e.g., collecting data in response to the auditor's inquiries, meeting for interviews, etc).

¹⁹⁰⁹ See Letter from Julia O. Strow, Vice President – Regulatory & Legislative Affairs, Cbeyond, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 3 (filed Jan. 6, 2003).

architectural arrangements to provide local voice service, we do not adopt any of the specific documentation requirements proposed by some carriers in this proceeding.¹⁹¹⁰

D. Modification of Existing Network

1. Background

630. In *Iowa Utilities Board*, the Eighth Circuit held that section 251(c)(3) requires “unbundled access only to an incumbent LEC’s existing network – not to a yet unbuilt superior one.”¹⁹¹¹ Specifically, the Eighth Circuit explained that incumbent LECs can be required to modify their facilities “to the extent necessary to accommodate interconnection or access to network elements,” but cannot be required “to *alter substantially* their networks in order to provide *superior* quality interconnection and unbundled access.”¹⁹¹²

631. In the *Triennial Review NPRM*, the Commission sought comment on its authority to require incumbent LECs to engage in activities necessary to activate loops that are not currently activated in the network.¹⁹¹³ The Commission also asked about the extent to which incumbent LECs have an obligation to modify their existing networks in order to provide access to network elements.¹⁹¹⁴ Commenters identified several specific issues regarding the interpretation of the Eighth Circuit’s holding, most notably in which situations incumbent LECs have responded to an order for high-capacity loop by attaching equipment and facilities to its network, or could issue a “no facilities available” response; whether carriers must remove equipment from a line in order to condition it; and the extent to which specially constructed transmission facilities are subject to unbundling obligations. To resolve these related questions about the scope of the incumbent LEC network that must be unbundled and which modifications constitute “construction,” and because they share a fundamental relationship to the definition of the network, we address them together in this section.

2. Discussion

a. Routine Network Modifications to Existing Facilities

632. We require incumbent LECs to make routine network modifications to unbundled transmission facilities used by requesting carriers where the requested transmission facility has

¹⁹¹⁰ See, e.g., Letter from Cronan O’Connell, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, Attach. at 1 (filed Feb. 13, 2003) (Qwest Feb. 13, 2003 Proposed EELs Safe Harbors *Ex Parte* Letter) (listing proposed documentation requirements, including the Qwest-designated “26 code” for each local interconnection trunk group).

¹⁹¹¹ *Iowa Utils. Bd. v. FCC*, 120 F.3d at 813.

¹⁹¹² *Id.* at 813 n.33 (emphasis added).

¹⁹¹³ *Triennial Review NPRM*, 16 FCC Rcd at 22805, para. 52.

¹⁹¹⁴ *Id.* at 22811-12, paras. 65-66.

**Interconnection Agreement Language
between XO and BellSouth**

**AMENDMENT
TO THE INTERCONNECTION
AGREEMENT BETWEEN
NEXTLINK TENNESSEE, INC. AND
BELL SOUTH TELECOMMUNICATIONS, INC.
DATED November 4, 1999**

Pursuant to this Agreement, (the "Amendment"), NEXTLINK Tennessee, Inc. ("NEXTLINK"), and BellSouth Telecommunications, Inc. ("BellSouth"), hereinafter referred to collectively as the "Parties," hereby agree to amend that certain Interconnection Agreement between the Parties dated November 4, 1999 and approved by the Tennessee Regulatory Authority March 28, 2000 (the "Agreement").

WHEREAS, BellSouth and NEXTLINK entered into the Agreement in the state of Tennessee and;

NOW THEREFORE, in consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby covenant and agree as follows:

1. Enhanced Extended Link

1.1 Where facilities permit and where necessary to comply with an effective FCC and/or State Commission order, BellSouth shall offer access to the Enhanced Extended Link ("EEL") as defined in Section 1.2 below.

1.2 Definitions

1.2.1 For purposes of this Amendment, references to "Currently Combined" network elements shall mean that such network elements are in fact already combined by BellSouth in the BellSouth network to provide service to a particular end user at a particular location.

1.2.2 BellSouth will provide access to the Enhanced Extended Link ("EEL") in the combinations set forth in 1.3 following, and subject to the terms and conditions set forth in 1.4.1 below. This offering is intended to provide connectivity from an end user's location through that end user's SWC and then connected to the NEXTLINK's POP serving wire center. Except as otherwise explicitly set forth herein, the circuit must be connected to NEXTLINK's switch for the purpose of provisioning telephone exchange service to NEXTLINK's end user customers. This can be done either in the collocation space at the POP SWC, or by using BellSouth's access facilities between the NEXTLINK's POP and NEXTLINK's collocation space at the POP SWC, as stated in 1.4.1 below.

1.2.3 BellSouth shall make available to NEXTLINK those EEL combinations and transport described in Section 1.3 below only to the extent such combinations of loop and transport network elements are Currently Combined. In addition, BellSouth will make available new combinations of loops and transport network elements in Density Zone 1, as defined in 47 C.F.R 69.123 as of January 1, 1999, in the Atlanta, GA; Miami, FL; Orlando, FL; Fort Lauderdale, FL; Charlotte-Gastonia-Rock Hill, NC; Greensboro-Winston Salem-High Point, NC; Nashville, TN; and New Orleans, LA, Except as stated above, other combinations of network elements will be provided to NEXTLINK only to the extent such network elements are Currently Combined.

1.2.4 Additionally, there may be instances wherein NEXTLINK will require multiplexing functionality. BellSouth will provide access to multiplexing within the central office pursuant to the terms, conditions and rates set forth in its Access Services Tariffs when the customer utilizes special access interoffice facilities. Multiplexing will be provided pursuant to the Agreement when unbundled network elements are used for interoffice transport.

1.3 EEL Combinations

1.3.1 DS1 Interoffice Channel + DS1 Channelization + 2-wire VG Local Loop

1.3.2 DS1 Interoffice Channel + DS1 Channelization + 4-wire VG Local Loop

1.3.3 DS1 Interoffice Channel + DS1 Channelization + 2-wire ISDN Local Loop

1.3.4 DS1 Interoffice Channel + DS1 Channelization + 4-wire 56 kbps Local Loop

1.3.5 DS1 Interoffice Channel + DS1 Channelization + 4-wire 64 kbps Local Loop

1.3.6 DS1 Interoffice Channel + DS1 Local Loop

1.3.7 DS3 Interoffice Channel + DS3 Local Loop

1.3.8 STS-1 Interoffice Channel + STS-1 Local Loop

1.3.9 DS3 Interoffice Channel + DS3 Channelization + DS1 Local Loop

1.3.10 STS-1 Interoffice Channel + DS3 Channelization + DS1 Local Loop

1.3.11 2-wire VG Interoffice Channel + 2-wire VG Local Loop

1.3.12 4wire VG Interoffice Channel + 4-wire VG Local Loop

1.3.13 4-wire 56 kbps Interoffice Channel + 4-wire 56 kbps Local Loop

1.3.14 4-wire 64 kbps Interoffice Channel + 4-wire 64 kbps Local Loop

1.4 Special Access Service Conversions

NEXTLINK may not convert special access services to combinations of loop and transport network elements, whether or not NEXTLINK self-provides its entrance facilities (or obtains entrance facilities from a third party), unless NEXTLINK uses the combination to provide a "significant amount of local exchange service," to a particular customer, as defined in 1.4.1 below. To the extent NEXTLINK converts its special access services to combinations of loop and transport network elements at UNE prices, NEXTLINK, hereby, certifies that it is providing a significant amount of local exchange service over such combinations, as set forth in 1.4.1 below. If, based on audits performed as set forth in this section, BellSouth concludes that NEXTLINK is not providing a significant amount of local exchange traffic over the combinations of loop and transport network elements, BellSouth may file a complaint with the appropriate Commission, pursuant to the dispute resolution process as set forth in the Interconnection Agreement. In the event that BellSouth prevails, BellSouth may convert such combinations of loop and transport network elements to special access services and may seek appropriate retroactive reimbursement from NEXTLINK. Notwithstanding any provision in the Parties interconnection agreement to the contrary, BellSouth may only conduct such audits as reasonably

necessary to determine whether NEXTLINK is providing a significant amount of local exchange service over facilities provided as combinations of loop and transport network elements, and, except where noncompliance has been found, BellSouth shall perform such audits no more than once each calendar year. BellSouth shall provide NEXTLINK and the FCC at least thirty days notice of any such audit, shall hire an independent auditor to perform such audit, and shall be responsible for all costs of said independent audit, unless noncompliance is found, in which case NEXTLINK shall be responsible for reimbursement to BellSouth for the reasonable costs of such audit. NEXTLINK shall cooperate with said auditor, and shall provide appropriate records from which said auditor can verify NEXTLINK's local usage certification as set forth in 1.4.1 below. In no event, however, shall BellSouth or its hired auditor require records other than those kept by NEXTLINK in the ordinary course of business.

- 1.4.1 EEL combinations for DS1 level and above will be available only when NEXTLINK provides and handles a significant amount of the end user's local exchange service. NEXTLINK shall be deemed to be providing a significant amount of the end user's local exchange service where NEXTLINK meets one of the three circumstances set forth in 1.4.1.1, 1.4.1.2, or 1.4.1.3 below. NEXTLINK hereby certifies that all requests for EEL combinations, existing or new, shall meet one of these circumstances. Should extraordinary circumstances exist where NEXTLINK is providing a significant amount of local exchange service to an end user but does not qualify under any of these three circumstances, NEXTLINK may petition the FCC for a waiver of these requirements.
 - 1.4.1.1 NEXTLINK certifies that it is the exclusive provider of the end user's local exchange service. In such circumstance, the EEL combination(s) must terminate at NEXTLINK's collocation arrangement at at least one BellSouth Central Office. Such EEL combinations may not be connected to other BellSouth tariffed services. NEXTLINK may use the EEL combination(s) that serve that end user to carry any type of traffic; or
 - 1.4.1.2 NEXTLINK certifies that it provides local exchange and exchange access service to the end user customer's premises and handles at least one third of the end user customer's local traffic measured as a percent of total end user customer local dialtone lines; and, for DS1 circuits and above, at least 50 percent of the activated channels on the loop portion of the EEL combination have at least 5 percent local voice traffic individually, and the entire loop facility has at least 10 percent local voice traffic. When such EEL combination includes multiplexing, each of the individual DS1 circuits must meet this criteria. In the circumstance set forth in this subsection, the EEL combination(s) must terminate at NEXTLINK's collocation arrangement in at least one BellSouth Central Office. Such EEL combinations may not be

connected to other BellSouth tariffed services. NEXTLINK may use such EEL combinations to provide other services to the end user, so long as the local usage criteria set forth in this subsection are met; or

- 1.4.1.3 NEXTLINK certifies that it provides originating and terminating local dialtone service on at least 50 percent of the activated channels on a circuit, and at least 50 percent of the traffic on each of these local dialtone channels is local voice traffic. Further, the entire loop facility must have at least 33 percent local voice traffic. When such EEL combination includes multiplexing, each of the individual DS1 circuits must meet this criteria. NEXTLINK does not need to provide a defined portion of the end user's local service, but the active channels, and the entire facility, must carry the amount of local exchange traffic specified in this option. In the circumstance set forth in this subsection, collocation is not required. Such EEL combinations may not be connected to other BellSouth tariffed services.

1.5 Rates

- 1.5.1 Subject to Section 1.2.3 preceding, for all other states, the non-recurring and recurring rates for the Currently Combined EEL combinations set forth in Section 1.3 and other Currently Combined network elements will be the sum of the recurring rates for the individual network elements plus a nonrecurring charge as set forth in Exhibit A to this Amendment. If a rate element is listed as NA in Exhibit A, then the appropriate individual UNE rate listed in Attachment 12 of the existing Interconnection Agreement will apply.

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Between ITC^DeltaCom and BellSouth**

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60 days after the Effective Date of this Agreement and negotiate final language on this issue and if not resolved, the Parties shall petition the Commission for resolution. In the interim, ITC^DeltaCom shall submit and BellSouth shall provision combinations pursuant to BellSouth's definition of "currently combined."

8.3 EELs

8.3.1 Where facilities permit and where necessary to comply with an effective FCC and/or State Commission order, or as otherwise mutually agreed by the Parties, BellSouth shall offer access to loop and transport combinations, also known as the Enhanced Extended Link ("EEL") as defined in Section 8.3.2 below.

8.3.2 Subject to Section 8.3.3 below, BellSouth will provide access to the EEL in the combinations set forth in Section 8.3.4 following. This offering is intended to provide connectivity from an end user's location through that end user's SWC to ITC^DeltaCom's POP serving wire center. The channels on the circuit sufficient to meet the local usage options described in Section 8.3.5 below, must be connected to ITC^DeltaCom's switch for the purpose of provisioning telephone exchange service to ITC^DeltaCom's end-user customers. The EEL will be connected to ITC^DeltaCom's facilities in ITC^DeltaCom's collocation space at the POP SWC, or ITC^DeltaCom may purchase BellSouth's access facilities between ITC^DeltaCom's POP and ITC^DeltaCom's collocation space at the POP SWC.

8.3.3 BellSouth shall provide EEL combinations to ITC^DeltaCom in Georgia regardless of whether or not such EELs are Currently Combined. In all other states, BellSouth shall make available to ITC^DeltaCom those EEL combinations described in Section 8.3.4 below only to the extent such combinations are Currently Combined. Furthermore, BellSouth will make available EEL combinations to ITC^DeltaCom in density Zone 1, as defined in 47 C.F.R. 69.123 as of January 1, 1999, in the Atlanta, GA; Miami, FL; Orlando, FL; Ft. Lauderdale, FL; Charlotte-Gastonia-Rock Hill, NC; Greensboro-Winston Salem-High Point, NC; Nashville, TN; and New Orleans, LA, MSAs regardless of whether or not such EELs are Currently Combined. Except as stated above, EELs will be provided to ITC^DeltaCom only to the extent such network elements are Currently Combined.

8.3.4 EEL Combinations

8.3.4.1 DS1 Interoffice Channel + DS1 Channelization + 2-wire VG Local Loop

8.3.4.2 DS1 Interoffice Channel + DS1 Channelization + 4-wire VG Local Loop

8.3.4.3 DS1 Interoffice Channel + DS1 Channelization + 2-wire ISDN Local Loop

8.3.4.4 DS1 Interoffice Channel + DS1 Channelization + 4-wire 56 kbps Local Loop

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- 8.3.4.5 DS1 Interoffice Channel + DS1 Channelization + 4-wire 64 kbps Local Loop
- 8.3.4.6 DS1 Interoffice Channel + DS1 Local Loop
- 8.3.4.7 DS3 Interoffice Channel + DS3 Local Loop
- 8.3.4.8 STS-1 Interoffice Channel + STS-1 Local Loop
- 8.3.4.9 DS3 Interoffice Channel + DS3 Channelization + DS1 Local Loop
- 8.3.4.10 STS-1 Interoffice Channel + DS3 Channelization + DS1 Local Loop
- 8.3.4.11 2-wire VG Interoffice Channel + 2-wire VG Local Loop
- 8.3.4.12 4-wire VG Interoffice Channel + 4-wire VG Local Loop
- 8.3.4.13 4-wire 56 kbps Interoffice Channel + 4-wire 56 kbps Local Loop
- 8.3.4.14 4-wire 64 kbps Interoffice Channel + 4-wire 64 kbps Local Loop
- 8.3.5 Special Access Service Conversions
- 8.3.5.1 ITC^DeltaCom may not convert special access services to combinations of loop and transport network elements, whether or not ITC^DeltaCom self-provides its entrance facilities (or obtains entrance facilities from a third party), unless ITC^DeltaCom uses the combination to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer. To the extent ITC^DeltaCom requests to convert any special access services to combinations of loop and transport network elements at UNE prices, ITC^DeltaCom shall provide to BellSouth a letter certifying that ITC^DeltaCom is providing a significant amount of local exchange service (as described in this Section) over such combinations. The certification letter shall also indicate under what local usage option ITC^DeltaCom seeks to qualify for conversion of special access circuits. ITC^DeltaCom shall be deemed to be providing a significant amount of local exchange service over such combinations if one of the following options is met:
 - 8.3.5.1.1 ITC^DeltaCom certifies that it is the exclusive provider of an end user's local exchange service. The loop-transport combinations must terminate at ITC^DeltaCom's collocation arrangement in at least one BellSouth central office. This option does not allow loop-transport combinations to be connected to BellSouth's tariffed services. Under this option, ITC^DeltaCom is the end user's only local service provider, and thus, is providing more than a significant amount of local exchange service. ITC^DeltaCom can then use the loop-transport combinations that serve the end user to carry any type of traffic, including using them to carry 100 percent interstate access traffic; or

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- 8.3.5.1.2 ITC^DeltaCom certifies that it provides local exchange and exchange access service to the end user customer's premises and handles at least one third of the end user customer's local traffic measured as a percent of total end user customer local dialtone lines; and for DS1 circuits and above, at least 50 percent of the activated channels on the loop portion of the loop-transport combination have at least 5 percent local voice traffic individually, and the entire loop facility has at least 10 percent local voice traffic. When a loop-transport combination includes multiplexing, each of the individual DS1 circuits must meet this criteria. The loop-transport combination must terminate at ITC^DeltaCom's collocation arrangement in at least one BellSouth central office. This option does not allow loop-transport combinations to be connected to BellSouth tariffed services; or
- 8.3.5.1.3 ITC^DeltaCom certifies that at least 50 percent of the activated channels on a circuit are used to provide originating and terminating local dial-tone service and at least 50 percent of the traffic on each of these local dial-tone channels is local voice traffic, and that the entire loop facility has at least 33 percent local voice traffic. When a loop-transport combination includes multiplexing, each of the individual DS1 circuits must meet this criteria. This option does not allow loop-transport combinations to be connected to BellSouth's tariffed services. Under this option, collocation is not required. ITC^DeltaCom does not need to provide a defined portion of the end user's local service, but the active channels on any loop-transport combination, and the entire facility, must carry the amount of local exchange traffic specified in this option.
- 8.3.5.2 In addition, there may be extraordinary circumstances where ITC^DeltaCom is providing a significant amount of local exchange service, but does not qualify under any of the three options set forth in Section 8.3.5.1.1, 8.3.5.1.2, 8.3.5.1.3. In such case, ITC^DeltaCom may petition the FCC for a waiver of the local usage options set forth in the June 2, 2000 Order. If a waiver is granted, the Parties shall amend this Agreement within 45 days of ITC^DeltaCom's request to the extent necessary to incorporate the terms of such waiver.
- 8.3.5.3 BellSouth may audit ITC^DeltaCom records to the extent reasonably necessary in order to verify the type of traffic being transmitted over combinations of loop and transport network elements. The audit shall be conducted by a third party independent auditor, and ITC^DeltaCom shall be given thirty days written notice of scheduled audit. Such audit shall occur no more than one time in a calendar year, unless results of an audit find noncompliance with the significant amount of local exchange service requirement. In the event of noncompliance, ITC^DeltaCom shall reimburse BellSouth for the cost of the audit. If, based on its audits, BellSouth concludes that ITC^DeltaCom is not providing a significant amount of local exchange traffic over the combinations of loop and transport network elements, BellSouth may file a complaint with the appropriate Commission, pursuant to the dispute resolution process as set forth in the Interconnection Agreement. In the event that BellSouth prevails, BellSouth may convert such

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combinations of loop and transport network elements to special access services and may seek appropriate retroactive reimbursement from ITC^DeltaCom.

8.3.5.4 ITC^DeltaCom may convert special access circuits to combinations of loop and transport UNEs pursuant to the terms of this Section and subject to the termination provisions in the applicable special access tariffs, if any.

8.3.6 Rates

8.3.6.1 Georgia

8.3.6.2 The non-recurring and recurring rates for the EEL Combinations of network elements set forth in 8.3.4 whether Currently Combined or new, are as set forth in Attachment 11.

8.3.6.3 On an interim basis, for combinations of loop and transport network elements not set forth in Section 8.3.4, where the elements are not Currently Combined but are ordinarily combined in BellSouth's network, the non-recurring and recurring charges for such UNE combinations shall be the sum of the stand-alone non-recurring and recurring charges of the network elements which make up the combination. These interim rates shall be subject to true-up based on the Commission's review of BellSouth's cost studies.

8.3.6.4 To the extent that ITC^DeltaCom seeks to obtain other combinations of network elements that BellSouth ordinarily combines in its network which have not been specifically priced by the Commission when purchased in combined form, ITC^DeltaCom, at its option, can request that such rates be determined pursuant to the Bona Fide Request/New Business Request (NBR) process set forth in this Agreement.

8.3.6.5 All Other States

8.3.6.5.1 Subject to Section 8.3.2 and 8.3.3 preceding, for all other states, the non-recurring and recurring rates for the Currently Combined EEL combinations set forth in Section 8.3.4 and other Currently Combined network elements will be the sum of the recurring rates for the individual network elements plus a non recurring charge set forth in Attachment 11.

8.3.6.6 Multiplexing

8.3.6.6.1 Where multiplexing functionality is required in connection with loop and transport combinations, such multiplexing will be provided at the rates and on the terms set forth in this Agreement.

8.4 Other Network Element Combinations

Tennessee

**Letter from American Consultants Alliance
to BellSouth**



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CONSULTANTS
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February 20, 2002

Ms. Shelley P. Walls
Manager – Regulatory Policy Support
BellSouth Interconnection Services
675 W. Peachtree St., NE
Atlanta, GA 30075

Dear Ms Walls:

Thank you for the opportunity to submit this proposal for American Consultants Alliance (ACA) to provide an examination and report to determine the compliance with the FCC Supplemental Order Clarification, Docket No. 96-98, for carriers converting from BellSouth's special access tariff rates to unbundled network element rates. BellSouth is allowed by the FCC order to conduct audits by American Consultants Alliance (an independent third party) to verify the carrier's compliance with the significant local usage requirements of the Supplemental Order.

In the Supplemental Order Clarification, Docket No. 96-98 adopted May 19, 2000 and released June 2, 2000 ("Supplemental Order"), the FCC stated:

"We clarify that incumbent local exchange carriers (LECs) must allow requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of unbundled network elements, and we allow incumbent LECs to subsequently conduct limited audits by an independent third party to verify the carrier's compliance with the significant local usage requirements."

By requesting this proposal BellSouth has shown initiative in addressing the risk that the carrier has self-certified but does not comply with the FCC's rules. The FCC recognized that allowing requesting carriers to use loop-transport combinations solely to provide exchange access service to a customer, without providing local exchange service, could have significant revenue ramifications because unbundled network elements are priced considerably lower than tariffed special access services. Also, there is growth in the number of carriers requesting conversion.

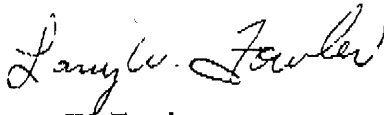
Our approach to conducting these audits, Percent Interstate Use (PIU) audits, and access audits is very different from other firms conducting audits. Our auditors have vast experience in special access circuit records and provisioning, Unbundled Network Elements (UNE), and audits. We do not take up your valuable time and the carrier's time to train our personnel. Our use of experienced personnel has resulted in highly successful and efficient audits and in conjunction with our detailed documentation our LEC clients have recovered millions of dollars.

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We have conducted: numerous audits of carrier's PIU ratios, access tariff filing audits, audits of separations systems, audits of CABS, and audits of access studies. We are currently conducting an audit of a carrier's conversion from special access rates to UNE rates on behalf of Sprint.

Our proposal is structured to demonstrate our understanding of your needs and to present a proven approach to meet those needs. We look forward to assisting BellSouth with this most important project.

Sincerely yours,

A handwritten signature in cursive script that reads "Larry W. Fowler".

Larry W. Fowler
President

Attachments

**BellSouth's Instructions to CLEC's
On Ordering EELs and Converting
Special Access Facilities to EELs**



CLEC Information Package

Unbundled Dedicated Transport - EELs

**CLEC
Information Package
May15, 2000**



CLEC Information Package

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Product Name

Dedicated Transport - EELs

Product Category

Loop and Interoffice Transport Combinations

Product and Technical Description

Service Description

Where facilities permit and where necessary to comply with an effective FCC and/or State Commission order or where otherwise BellSouth agrees to do so, BellSouth offers access to Enhanced Extended Links ("EELs"). EELs are combinations of BellSouth's Interoffice Channel UNE with or without multiplexing functionality and BellSouth Local Loop UNE

This offering is intended to provide connectivity from an end user's location through that end user's Serving Wire Center (SWC) and then connected to the CLEC's collocated SWC. The circuit must be connected to the CLEC's switch for the purpose of provisioning telephone exchange service to the CLEC's end-user customers. This can be done either in the collocation space at the POP SWC, or by using BellSouth's access facilities between the CLEC-1's POP and CLEC-1's collocation space at the POP SWC. Terminations within BellSouth's central offices will be in collocation.

EELs are to be used for local exchange and exchange access. EEL customers must certify that they are providing a significant amount of local exchange service over combinations of unbundled network elements in order to convert Special Access facility to UNE pricing. EELs can be ordered as new services in specific locations or converted from tariff services to UNE pricing through out BellSouth's franchised territory. *

Features and Benefits

The EEL allows new entrants to serve customers without having to collocate in every central office in BellSouth's territory. CLEC's collocation costs would decrease, and it would need to collocate in as few as one incumbent LEC central office to provide service.

These EEL products will be dedicated transport. By definition, dedicated transport is dedicated to a particular customer. Dedicated transport is a point to point service consisting of three possible components: interoffice channel, channelization and loops.

The following definitions apply to the components:

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1. Interoffice Channel provides a dedicated point to point transmission path, and it's associated electronics between BST wire centers or switches
2. Channelization is the function performed when a higher level facility is separated into lower level services, e.g. DS3 to 28 DS1s or DS1 to 24 DS0s. Channelization can be accomplished through the use of a multiplexer or a Digital Cross-connect System (DCS). Once the basic channelization system has been installed, channels can be activated all at once or on an as-needed basis. Like the tariffed service, this service is available on a limited basis (See NECA 4). AMI and B8ZS line coding with either Super Frame (SF) and Extended Super Frame (ESF) framing formats will be supported as options.

Lower level services ride the channelized facility. Channelization equipment is not placed on a customer's premise for these services. A multiplexer (mux) can be located in the POP SWC, the end user's SWC, or in a remote Central Office.

3. Loop is a dedicated point to point transmission path and the associated electronics between the end user's premises and the end user's Serving Wire Center.

Basic Service Capabilities

Unbundled Dedicated Transport EELs will be offered as dedicated transport at multiple bandwidths, specifically:

Configuration	Interoffice Channel	Loop
1	DS1 transport with 1/0 multiplexing in End User SWC	2-wire VG, 4-wire VG, 2-wire ISDN, 4-wire 56/64 kbps
2	DS1 transport	DS1
3	DS3 transport	DS3
4	STS-1 transport	STS-1
5	DS3 transport with 3/1 multiplexing in End User SWC	DS1
6	STS-1 transport with 3/1 multiplexing in End User SWC	DS1
7	2-wire VG	2-wire VG
8	4-wire VG	4-wire VG
9	4-wire 56/64 kbps	4-wire 56/64 kbps

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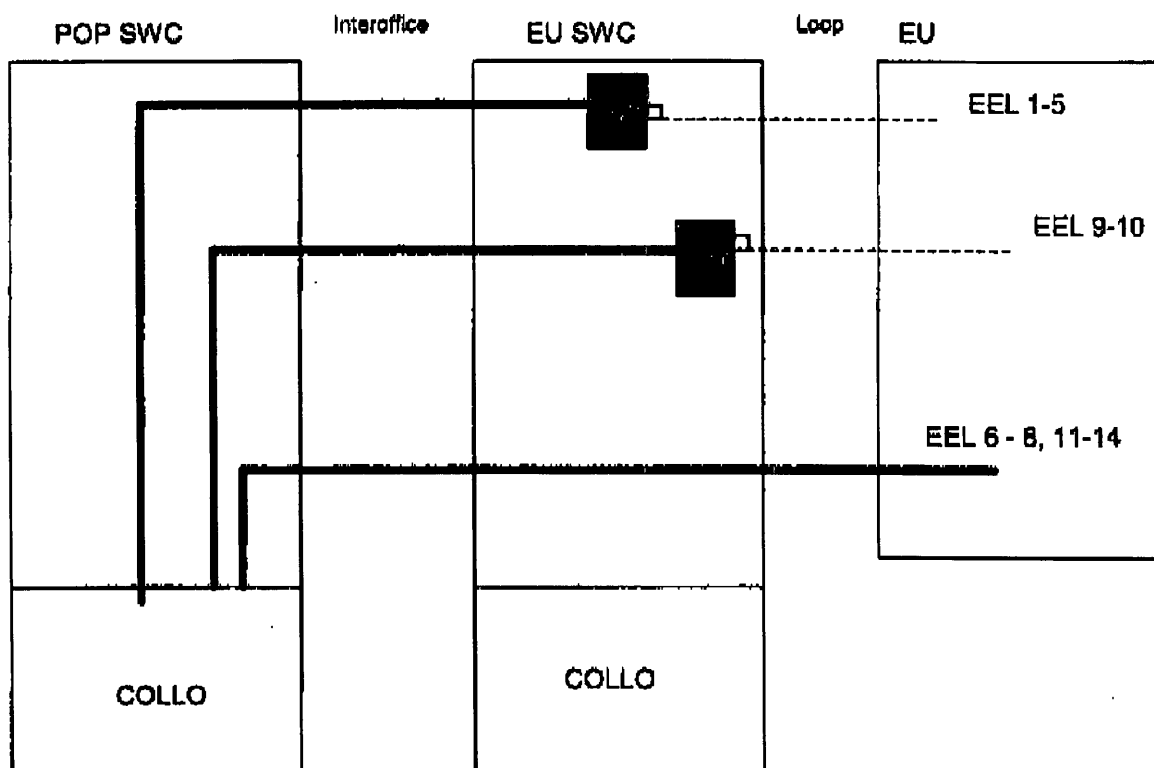
Network Diagrams

The following diagram illustrates the network architectures of the different EELs (numbering corresponds to above list).

Enhanced Extended Links

POP - Point of Presence
SWC - Serving Wire Center
EU - End User
Collo - Collocation

■ Multiplexing
□ Low Level Plug In



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Pre-Ordering Checklist

Availability

1. New EEL configurations are available throughout the State of Georgia and in zone density 1 of the following Metropolitan Service Areas (MSAs): Greensboro, Orlando, Miami, Ft. Lauderdale, Charlotte, New Orleans, and Nashville.
 2. In all locations, to the extent the CLEC converts its special access services to combinations of loop and transport network elements at UNE prices, the CLEC certifies that it is providing a significant amount of local exchange service over such combinations network combination which compose these network element combination (including EEL configurations). See four below. *
 3. The CLEC must negotiate for these products either in a new contract or an amendment added to their current contract.
 4. Per the CLEC's Interconnection Agreement, the CLEC must certify that it is providing a significant amount of local exchange service over combinations or unbundled loops and transport network elements in order to convert special access facilities to UNE pricing. Combinations including EELs for DS1 level and above will be available only when CLEC-1 provides and handles at least one third of the end user's local traffic over the facility provided. In addition, on the DS1 loop portion of the combination, at least fifty (50) percent of the activated channels must have at least five (5) percent local voice traffic individually and, for the entire DS1 facility, at least ten (10) percent of the traffic must be local voice traffic. *
- When combinations of loop and transport network elements include multiplexing, each of the individual DS1 circuits must meet the above criteria.
5. A channelized facility or collocation must be ordered prior to ordering an EEL.

Billing Information

- One month minimum billing is required. Minimum mileage is one mile, except as noted above.
- The EELs described in this package are CABS to CABS services.
- Manual Coordination is included in the one (1) time non-recurring charge.